A

AMRAN MOHD JIN

v.

PP

B

HIGH COURT MALAYA, MUAR
JEFFREY TAN J
[CRIMINAL APPEAL NO: 42-47-2004]
21 JULY 2006

C ***CRIMINAL PROCEDURE:*** *Sentence - Appeal against sentence - Concurrent or consecutive - 18 years' imprisonment and 12 strokes of cane each for offence of rape and offence of incest - Whether criminal behaviour of appellant justifies consecutive sentences - Whether public interest overrides personal circumstances of appellant*

D The appellant pleaded guilty to two offences in the court below, namely, the rape of his daughter and incest with the same daughter. He was sentenced to 18 years imprisonment and 12 strokes of the cane for each offence. He appealed against his sentence for a shorter term of imprisonment and for the sentences E to run concurrently.

Held (dismissing the appeal):

(1) The court below had assessed the sentences in accordance F with established judicial principles. The plea of guilt, the plea in mitigation, the gravity of the offence, the public interest and the facts of the case were all properly considered. The individual sentences were not inappropriate in the light of the facts and circumstances. Although the court below had not G considered the totality principle, the criminal behaviour of the appellant as a whole justified the cumulative effect of the consecutive sentences. (para 9)

(2) The appellant first raped the victim when she was 10 years old. The appellant then habitually raped the victim whenever H he was alone in the house with the victim. He continued this abominable act for about six years and did not come to his senses when the victim was 5 1/2 months' pregnant with his child. Although the consecutive sentences would have a crushing effect on the appellant, public interest must override I the personal circumstances of the appellant. Public interest would not permit any reduction of the sentences. (para 10)

Case(s) referred to:
Attorney-General v. Dominic Cheung Kai Man (Application of Review No 1 of 1987) ***(refd)***
Bachik Abdul Rahman v. PP [2004] 2 CLJ 572 CA ***(refd)***
Bhandulananda Jayatilake v. PP [1982] 1 MLJ 83 ***(refd)***
PP v. Loo Choon Fatt [1976] 2 MLJ 256 ***(refd)***
PP v. Wong Kok Sein & Ors [1988] 1 CLJ 873; [1988] 2 CLJ (Rep) 630 HC ***(refd)***
Rex v. Leo de Cruz [1935] MLJ 1 ***(refd)***

Legislation referred to:
Penal Code, s. 376A

Other source(s) referred to:
Tan Kee Heng, *Civil and Criminal Appeals in Malaysia*, pp 191-192

Appellant in person
For the respondent - Mohd Ashrof Adrin Kamarul; A-G's Chambers

Reported by Usha Thiagarajah

JUDGMENT

Jeffrey Tan J:

[1] In the court below, the appellant pleaded guilty to the following 2 offences, to wit, the rape of his daughter and then incest with the same said daughter.

First charge

> Bahawa kamu antara tarikh 15.5.1996 jam 4.30 petang hingga tarikh 31.7.2002 di rumah No. 504, Blok 21, Jalan Bunga Siantan 1, Felda Pemanis 1, Segamat, di dalam Daerah Segamat, Dalam Negeri Johor, telah didapati melakukan rogol ke atas Siti Amilah binti Amran KPT No: 850210-01-5640 yang mana ketika berumur itu 11 tahun sehingga 17 tahun. Oleh yang demikian kamu telah melakukan suatu kesalahan di bawah Seksyen 376 Kanun Keseksaan dan boleh dihukum di bawah peruntukan yang sama,

Second charge

> Bahawa kamu antara tarikh 01.08.2002 hingga bulan April 2004 di rumah No. 504, Blok 21, Jalan Bunga Siantan 1, Felda Pemanis 1, Segamat, di dalam Daerah Segamat, Dalam Negeri Johor, telah didapati melakukan sumbang muhram ke atas Siti Amilah binti Amran KPT No: 850210-01-5640 yang mana ketika

itu di antara umur 17 tahun hingga 19 tahun (anak kandung). Oleh yang demikian kamu telah melakukan suatu kesalahan di bawah Seksyen 376A Kanun Keseksaan dan boleh dihukum di bawah Seksyen 376B Akta yang sama.

[2] This is the appellant's appeal (the appeal record was filed on 20 June 2006) against the sentences of 18 years imprisonment and 12 strokes of the cane for each offence, all to take consecutively effect, that were handed down on 7 October 2004.

[3] The appellant argued his own appeal. He said he was 45, regretted his act and would not do it again. He asked for shorter terms of imprisonment and for the sentences to take concurrent effect. The learned DPP, Mohd Ashrof Adrin bin Kamarul highlighted that the victim delivered a child (appellant's) in 2004, that both offences were separate and distinct, and that the 2nd offence was under s. 376A of the Penal Code which came into effect on 1 August 2002.

[4] On the matter of whether sentences should be ordered to run concurrently or consecutively, the Court of Appeal per Augustine Paul JCA, as he then was, in *Bachik bin Abdul Rahman v. Public Prosecutor* [2004] 2 CLJ 572, explained that the court would be guided by the one transaction rule and the totality principle:

> The combined effect of s. 282 and s. 292 is that unless the court imposing a sentence says anything to the contrary, the sentence runs from the date on which it was passed (see *Ooi Sim Yim v. Public Prosecutor* [1990] 1 MLJ 88). The exercise of the discretion to determine the date of commencement of the sentence of imprisonment is dependent on the facts and circumstances of each case. In deciding whether the terms of imprisonment should be consecutive or commence at another date the court will be guided by the one transaction rule and the totality principle. Pursuant to the one transaction rule where two or more offences are committed in the course of a single transaction all sentences in respect of these offences should be concurrent rather than consecutive (see *R v. Saleem* [1964] Crim LR 482; *R v. Walsh* [1965] Crim LR 248). For there to be one transaction four elements must be present, that is to say, proximity of time, proximity of place, continuity of action and continuity of purpose or design (see *Jayaraman & Ors v. PP* [1979] 2 MLJ 88; *Amrita Lai Hazra v. Emperor* 42 Cal 957; *Chin Choy v. PP* [1955] MLJ 236). The rule, however, is not absolute. As Yong Pung How CJ said in *Kanagasuntharam v. PP* [1992] 1 SLR 81 at p 83:

> The English courts have recognised that there are situations where consecutive sentences are necessary to discourage the type of criminal conduct being punished: see *R v. Faulkner* [1972] 56 Cr App R 594, *R v. Wheatley* [1983] 5 Cr App R (S) 417 and *R v. Skinner* [1986] 8 Cr App R (S) 166. The applicability of the exception is said to depend on the facts of the case and the circumstances of the offence. It is stated in broad and general terms and although it may be criticised as vague, it is necessarily in such terms in order that the sentence may impose an appropriate sentence in each particular case upon each particular offender at the particular time the case is heard.

[5] In the instant case, there were undoubtedly 2 distinct and separate offences, and the sentences could only be consecutive and not concurrent. The direction of the court below on the commencement of the sentences was correct in law and so, could not be disturbed.

[6] In relation to the individual sentences of imprisonment, "it has been laid down that the court will not interfere with the sentence, unless the judge has proceeded on wrong principles or given undue weight to some of the evidence" (*Rex v. Leo de Cruz* [1935] MLJ 1 per Huggard CJ). "The High Court sitting in exercise of its (appellate) powers will not normally alter the sentence unless it is satisfied that the sentence of the lower court is either manifestly inadequate or grossly excessive or illegal or otherwise not a proper sentence, having regard to all the facts disclosed on the record or that the lower court clearly has erred in applying the correct principles in the assessment of the sentence passed" (*Public Prosecutor v. Loo Choon Fatt* [1976] 2 MLJ 256 per Hasim Yeop A Sani J).

[7] *Civil and Criminal Appeals in Malaysia* by Tan Kee Heng at pp 191-192, summarised the position as follows:

> ... the appellate court is ready to interfere with the sentence imposed by the trial court upon proof of one or more of the following circumstances: (a) The sentence imposed by the trial court was manifestly excessive or inadequate, (b) There is a manifest error either in law or in considering the facts and circumstances of the case, (c) The sentence passed by the trial court is manifestly wrong in the sense of being illegal or of being unsuitable to the proved facts and circumstances, (d) The trial court has given undue weight to some of the evidence, (e) The trial court, in fixing the sentence, had failed to adequately consider

A all the relevant factors either for or against the offender, (f) The sentence was wrong in law. (g) The unsatisfactory features of the proceedings in the lower court (h) The charge has been hanging over the accused's head for a considerable period, (i) Justice does not appear to have been done.

B **[8]** The Federal Court per Raja Azlan Shah Ag LP (as HRH then was) in *Bhandulananda Jayatilake v. PP* [1982] 1 MLJ 83, 84, imparted the following guide:

> Is the sentence harsh and manifestly excessive? We would
C paraphrase it in this way. As this is an appeal against the exercise by the learned judge of a discretion vested in him, is the sentence so far outside the normal discretionary limits as to enable this court to say that its imposition must have involved an error of law of some description? I have had occasion to say elsewhere, that the very concept of judicial discretion involves a right to
D choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred. That is quite inevitable. Human nature being what it is, different judges applying the same principles at the same time in the same country to similar facts
E may sometimes reach different conclusions (see *Jamieson v. Jamieson* ([1952] AC 525)). It is for that reason that some very conscientious judges have thought it their duty to visit particular crimes with exemplary sentences; whilst others, equally conscientious, have thought it their duty to view the same crimes with leniency. Therefore sentences do vary in apparently similar
F circumstances with the habit of mind of the particular judge. It is for that reason also that this court has said it again and again it will not normally interfere with sentences, and the possibility or even the probability, that another court would have imposed a different sentence is not sufficient *per se* to warrant this court's
G interference.

[9] But the court below had assessed the sentences in accordance with established judicial principles. The plea of guilt, the plea in mitigation, the gravity of the offence, the public
H interest, and the facts of the case were all properly considered. The individual sentences were not inappropriate in the light of the facts and circumstances. Except that the court below had not considered the totality principle. "... the totality principle requires the court in the last instance to take a look at the total and to
I see whether, in the circumstances, it is just and appropriate and if not to reduce it accordingly" (*PP v. Wong Kok Sein & Ors* [1988] 1 CLJ 873; [1988] 2 CLJ (Rep) 630, quoting from the Hong

Kong case of *Attorney-General v. Dominic Cheung Kai Man* Application of Review No 1 of 1987). Be that as it may, it is yet the considered opinion of this court that the cumulative effect of the consecutive sentences was entirely justified by the criminal behaviour of the appellant as a whole.

[10] According to the facts of the case, the appellant first raped the victim when she was 10. Then the appellant habitually raped the victim whenever he was alone in the house with the victim. Then the appellant blithely continued his abominable act for something like six years. The last incident was most sickening. The appellant would not even desist or come to his senses even when the victim was 5 1/2 months' pregnant with his child. The appellant was less than human. Undoubtedly, the consecutive sentences would have a crushing effect on the appellant. But public interest must override the personal circumstances of the appellant. Public interest would not permit any reduction of the sentences.

[11] For the reasons above, this appeal against sentence is dismissed.